whether title is legal or equitable is of little or no consequence. But the question is a vital one in those States, as in Virginia, where the distinction between law and equity, and legal and equitable titles, has been rigidly maintained from earliest times. See the more recent case of *Grizzle* v. *Fletcher*,[6] where the Virginia Court held that the equitable owner (and the mortgagor, or grantor, in an unsatisfied mortgage is but equitable owner) of an insurance policy, could not maintain an action at law thereon, because of his merely equitable title—a highly technical but quite sound ruling.

The conflict between the "legal title theory" and the "lien theory", in the case of outstanding *unsatisfied* mortgages and deeds of trust, is of special importance in actions on the case at law, for tortious injury to the mortgaged property. If, in Virginia, for example, the *mortgagor* or (grantor-debtor in a deed of trust) may maintain an action at law against a railway company for the burning of fences or houses, or forests, on the mortgaged estate, what defence may the railway company make, when the *mortgagee* or *trustee* later institutes his action for damages for the same injury, standing on his own legal title? This question becomes all the more important where the injury done reduces the value of the security to a point *below the amount of the debt secured.*

On the whole, this departure from ancient landmarks is to be deprecated as likely to open the door to innumerable difficulties in the future, practical as well as theoretical. To illustrate: A executes to T, a deed of trust, on his house and lot to secure B $20,000—the house worth $15,000 and the lot $10,000. By the negligence of X, the house is destroyed by an explosion: Who, under the doctrine of *Gravatt* v. *Lane*, may sue at law for the destruction of the house? If the debtor may sue and recover the full amount of damages suffered, the creditor's rights are seriously impaired. If, on the other hand, the trustee is the proper plaintiff, the rights of all parties are properly protected, and ancient landmarks of the law are preserved. How may we reconcile this conclusion with *Gravatt* v. *Lane?*

W. M. LILE.

ACCESSARIES, WHEN AND WHERE TRIED; HOW INDICTED.—Section 4766, Code 1919, provides that,

> "An accessary, either before or after the fact, may, *whether the principal felon be convicted or not,* or be amenable to justice or not, be indicted, convicted and punished in the county or corporation in which he became accessary, or in which the principal felon might be indicted. Any such accessary before the fact may be indicted either with such principal or separately." (Italics ours.)

[6] 127 Va. 663 (1920).

From the wording of the above statute, in view of the clause, *"whether the principal felon be convicted or not"*, a reasonable implication can be drawn that the accessary may be tried and convicted even though the principal be not found guilty or though he be tried and acquitted. This statute is obviously in derogation of the common law doctrine on the subject and the question arises from its construction in just what respects it contradicts the latter.

At common law, an accessary must be indicted and prosecuted as such; nor can he be tried before the principal without his own consent, as the crime of the former depends upon the conviction of the latter.[1] Since the accessary must be convicted of a felony of the same species as the principal, it is proper to include them both in the same indictment, hence both may be tried together. However, at common law the principal must be convicted first and if he is acquitted both must be acquitted.[2] Likewise if the principal cannot be apprehended, the accessary cannot be punished at all.[3] The rules of the common law in this respect have been greatly modified by statutes and in some states it is provided that an accessary before the fact shall be deemed a principal and may be indicted, convicted and punished as such.[4] Where such statutes prevail, obviously, all distinction is abolished and an accessary before the fact may be indicted, tried and convicted as principal, since from the context of the statutes he is, in effect, himself, a principal.[5]

However, such is not the construction of the Virginia statute. In *Thornton* v. *Commonwealth*,[6] (referring to the Code of 1860, ch. 199, § 7, which provided that, "In the case of every felony, every principal in the second degree and every accessary before the fact shall be punishable as if he were the principal in the first degree", which is the exact wording of Va. Code 1919, § 4764, and also, referring to Code 1860, p. 813, ch. 199, § 9, which is identical with § 4766 of the New Code) it was held that the statutes did not go far enough to make an accessary before the fact to a felony liable to be convicted on an indictment against him as principal but that he must be *indicted* and *tried* as accessary and was merely *punishable* as principal. So in Virginia it is settled that an accessary must be indicted and tried as such.

The next consideration is whether the accessary may be convicted and punished although the principal be tried and acquitted.

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[1] Commonwealth *v.* Andrews, 3 Mass. 126 (1807), Note, 3 Am. Dec. 22; Whitehead *v.* State (Tenn.), 4 Humph. 278 (1843).

[2] McCarty *v.* State, 44 Ind. 214, 15 Am. Rep. 232 (1873); *Ex parte* Bowen (Fla.), 6 So. 65 (1889); Bowen *v.* State, 25 Fla. 645, 6 So. 459 (1889).

[3] Whitehead *v.* State, *supra.*

[4] Pa. St. 1920, § 7666; Conn. Gen. St. 1918, § 6716; N. Y. Pen. Code 1909, § 29.

[5] State *v.* Bogue (Kan.), 34 Pac. 410 (1893); People *v.* Bliven, 112 N. Y. 79, 19 N. E. 638 (1889); Spies *v.* People, 122 Ill. 1, 3 Am. St. Rep. 320 (1887).

[6] 24 Gratt. 657 (1874).

That an accessary tried before the principal and convicted, is, upon the subsequent trial and acquittal of the principal, entitled to a new trial and acquittal was settled in *Maybush* v. *Commonwealth.*[7] In deciding this case the Court said:

> "In order to convict the plaintiff in error of subornation of perjury, it was essential for the Commonwealth to show that the person whom he is alleged to have suborned committed perjury. * * * If it had been shown to the contrary that the person alleged to have been suborned had been indicted for the offense of the perjury alleged, and had been tried and acquitted, it would have entitled the plaintiff in error to an acquittal of the offense of subornation for which he was indicted. * * * And such trial and acquittal of Graves (principal) having been subsequent to the trial and finding of the jury against the prisoner in the same court, it was error to overrule the prisoner's motion to set aside the verdict and grant him a new trial on that ground."

This interpretation of the Code, 1873, ch. 195, § 9 (in effect at the time of the decision and being the same as § 4766 of the New Code) seems to have removed all doubt in Virginia that, if the accessary be tried and convicted prior to the trial of the principal, upon the trial and acquittal of the latter, a verdict against the former must be set aside.

What, then, is the situation in Virginia within the meaning of the statute authorizing the conviction of the accessary, "whether the principal felon be convicted or not", when the accessary is brought to trial before the principal or where the latter is not amenable to justice? The question of the construction of the statute as provided in Acts of Assembly, 1877, ch. 10, § 9, (the same as § 4766 of the New Code) arose in *Hatchett* v. *Commonwealth.*[8] The prisoner was indicted as accessary before the fact of murder jointly with the principal and another accessary. The other accessary had been tried and acquitted and the principal had not been tried but was under arrest. Upon the question whether the prisoner could be convicted as accessary prior to the conviction of his principal and in the absence of sufficient evidence as to his principal's guilt it was held that he could not be convicted. The Court in rendering this decision said:

> "He could only be indicted under this statute as accessary. It gives no authority to indict him as principal. * * * Upon this view of the statute the conclusion is obvious that an accessary to a felony cannot be prosecuted for a substantive offense, but only as an accessary to the crime perpetrated by the principal felon, and in order to his conviction, although it is not necessary now to show that the principal felon has been convicted, it is necessary to show that that substantive offense,

[7] 29 Gratt. 857 (1878).
[8] 75 Va. 925 (1882).

to which he is charged as having been accessary, has been committed by the principal felon."

Since the evidence did not appear sufficient to connect the principal with the crime, the prisoner was acquitted as being an accessary.

It might be of interest to examine a few of the statutes of other States which pertain to the trial and indictment of accessaries. Better worded and consequently less ambiguous is Ky. St. 1915, § 1128, wherein, in part, it is provided that:

"In all felonies, accessaries before the fact, shall be liable to the same punishment as principals, and may be prosecuted jointly with principals, or severally, though the principals be not *taken* or *tried*."

This statute does not declare that the accessary may be convicted although the principal be not found guilty. It goes no farther than to say that the former may be prosecuted and convicted though the latter be not "taken or tried". It does not therefore relieve the Commonwealth of the duty of proving the guilt of the principal—the actual perpetrator of the crime—in order to convict the accessary.[9] An excellent example of clarity is to be found in Ga. Pen. Code 1911, § 49, which provides that:

"An accessary before or after the fact may be indicted, tried, convicted, and punished, notwithstanding the principal offender may have been pardoned or otherwise discharged after his conviction, or cannot be taken so as to be prosecuted and punished".

The phrase, "or cannot be taken so as to be prosecuted and punished," clearly implies that if the principal were taken he would be convicted as his guilt has been established. A like result has been arrived at by the Virgina Court in interpreting § 4766 of the New Code (or prior statutes in the exact wording), the language of which it is submitted does not clearly import this meaning.

The matter would seem to resolve itself into whether or not at the trial of the accessary the evidence against the principal is conclusive. If it is the former may be convicted even though the latter be not yet convicted or amenable to justice. The conviction of the principal is not an element of the crime of the accessary, under statutes similar to that of Virginia, but the guilt of the principal is the foundation of it. So it would seem that before a jury would be authorized to convict the defendant on trial as accessary, the State would have to prove the guilt of the person charged as principal to their satisfaction beyond a reasonable doubt, the court explaining such a doubt, and also prove the guilt of the defendant on trial as such accessary, to the same degree of certainty.[10]

J. W. W.

[9] Begley *v.* Commonwealth, 26 Ky. Law Rep. 598, 82 S. W. 285 (1904) See Reed *v.* Commonwealth, 125 Ky. 126, 100 S. W. 856 (1907).

[10] Cantrell *v.* State, 141 Ga. 98, 80 S. E. 649.